# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

## No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS, ET AL.,

Appellants,

*versus*

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY AND UNION BARGE LINE CORPORATION.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

## BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

ARTHUR A. MORENO,
Counsel for Appellees.

LEMLE MORENO & LEMLE,
(Of Counsel).

## SUBJECT INDEX.

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*May It Please the Court:*

A motion to dismiss or affirm has heretofore been made. The motion shows that there is no substantial Federal question involved. The statement in the brief of appellants that they are entitled to an appeal as a matter

of right, is refuted, not only by analysis, but by the action of this court in these very same cases heretofore taken.

The present appellants filed an application for a writ of certiorari to review the very judgments which are at issue here. The application for writs of certiorari were Numbers 818, 819, 820, 821, 822, 823, 824, 825 and 826 of the docket of this Honorable Court, October Term, 1947. The application for writs of certiorari were denied in these cases on the 21st day of June, 1948. If there had been any merit in the claim here made of a substantial Federal question wrongly decided by the Circuit Court of Appeals, writs of certiorari would have been granted on the applications heretofore made. The very fact that these applications were denied is the best argument in support of the contention of the various taxpayers that there is no substantial Federal question presented.

The claim of a right to an appeal is based upon § 240 of the Judicial Code, as amended, (28 U. S. C. A. § 347). The right to an appeal rests upon the contention that there was drawn in question the validity of a statute of Louisiana repugnant to the Constitution of the United States, and the decision was against its validity. We challenge the statement that the Circuit Court of Appeals denied the validity of Act 152 of 1932, as amended by Act 59 of 1944, by virtue of which these taxes were imposed. We say, unqualifiedly and unequivocally, that the United States Circuit Court of Appeals did not decide that the statute was invalid, but, on the contrary, upheld the validity of the statute by making it applicable to the DeBardeleben Coal Corporation, *Ott, Commissioner of Finance, v. DeBardele-*

*ben, 166 Fed. (2) 509*, which was a companion suit to the suits which are sought to be reviewed here. In the *DeBardeleben Coal Corporation* case, it held that the water equipment of the DeBardeleben Coal Corporation had a taxing situs in Louisiana, and, consequently, its property was subject to the taxes imposed by Act 152 of 1932, as amended by Act 59 of 1944.

If the Circuit Court of Appeals had decided against the validity of the act, it would have automatically upheld the contention of the DeBardeleben Coal Corporation that the taxes were unconstitutionally collected. It, however, held that a part of the taxes imposed under the act were constitutionally exacted, but remanded the case to the United States District Court for the excision from the assessment of property located in Alabama and never within the taxing power of Louisiana.

However, the position of the various appellees is not dependent upon a historical recital of the litigation, but is supported by an analysis of the judgments under attack. The United States Circuit Court of Appeals clearly stated the issue which it decided in the following words:

> "The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there".

The Court of Appeals further said:

> "The court below found from these facts that the tugboats and barges of American, Mississippi and Union were never permanently within the State of

Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans".

The Circuit Court of Appeals then reviewed a number of cases decided by this Honorable Court and said:

"Applying these legal principles to the facts of this case we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American and Union acquired no tax situs in Louisiana and that no tax could be legally assessed and collected by that State or by the City of New Orleans".

It did not hold that the Legislature of Louisiana in passing the statute under consideration had violated the prohibitions of the Constitution of the United States. On the contrary, it held, in the *Debardeleben Coal Corporation* case, that there had been no violation, since it upheld the exercise of the taxing power under the statute under consideration. Reduced to its lowest level, the contention made by the appellants is that regardless of taxing situs, the State of Louisiana may impose a tax on any water craft which comes into the State, based upon the percentage of mileage traveled within the State and the percentage of mileage traveled without the State. Reduced to its ultimate terms, the contention is that because the Circuit Court of Appeals held that the State of Louisiana could not tax watercraft coming into the State in connection with interstate commerce, if such watercraft had not acquired a taxing situs in the State of Louisiana, that, therefore, the Circuit Court of Appeals held the statute to be unconstitu-

tional. Certainly, any statute that would attempt to tax watercraft coming into the State of Louisiana for one or two days out of a year would be unconstitutional. Certainly, no substantial Federal question is presented by such a contention, because it is inconceivable that this Court would hold constitutional a statute having that intention and purpose and so applied. If such a statute when so applied could be held to be constitutional, it would result that at any time any watercraft entered any state for one or two days, it would become subject to taxation by that state on the basis of mileage traveled within the state. It is hardly believeable that anyone would contend for the validity of a statute intended to tax interestate commerce in so fantastic a fashion. If such be the basis of the contention, it presents no substantial Federal question.

We appreciate that the resolution in the test tube of logic of the contention advanced by the appellants produces a wholly distasteful potion. However, in legal principle, there is no escape from the substance of the contentions made by the appellants. The contention of the appellants finds its basis in the statement of the United States District Court in its conclusions of law, wherein it was said:

> "The continued retention of any of the aforementioned illegal taxes, paid under protest by the respective parties in interest, constitutes a taking of property without due process of law, in violation of the Federal and State Constitutions".

The statement in the brief of appellants confuses the judgment which this Court is called upon to review.

The quotation is from the opinion of the United States District Court, but is not contained in the opinion of the United States Circuit Court of Appeals. The fact that that court affirmed the judgment of the District Court is no warrant for contending that the reasoning of the one court was precisely the reasoning of the other court. However, even if the quotation were the expression of the United States Circuit Court of Appeals, it should not further the cause of the appellants. The United States District Court held in effect that the statute could not have application to property not within the taxing power of the State. It did not hold, nor even suggest, that where property has a taxing situs in Louisiana, that the Legislature acted unconstitutionally in adopting a method of taxation for property within the sovereign power of the State. It in effect held that the statute could not apply to property which had a taxing situs respectively in Delaware and Pennsylvania. The gulf of difference from holding a statute unconstitutional and holding it inapplicable to a given set of facts must be clearly discernible.

It is said in the brief of appellants the following:

> "Had the Circuit Court of Appeals *applied* the State law here, it would have resulted in *judgment* for the *appellants* instead of the appellees; instead the Circuit Court of Appeals, in effect, held the State Statute repugnant to the Constitution of the United States. The statute in question (Act 59 of 1944 of the Legislature of Louisiana) specifically sets forth that interstate carriers, such as appellees herein, who run their lines within Louisiana, shall be as-

sessed on a proportionate mileage basis, Section 5, Paragraph 'g' of said Statute reading as follows:

> '(g) "For the purpose of such valuation, assessment and taxation in Louisiana, such parishes and municipalities shall be hereby fixed and declared, respectively, *to be a taxable situs in this state* of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said tax-payer be a *resident or a non-resident* of Louisiana and *irrespective of whether or not here domiciled locally or otherwise.*" (Emphasis supplied.)'

"Thus, it is clearly seen, that had the Circuit Court of Appeals applied the State Statute they would have necessarily found for appellants herein; they could not have done otherwise. It will be noted that there is no provision whatsoever in the Statute in question which allows for a Court to first find that the barges and tow-boats have a taxing situs in Louisiana. If such a condition precedent had been contained in the Statute, then appellees' position here may have been on a more sound basis. The Statute unequivocally fixes the taxing situs in Louisiana for the portion of the property sought to be taxed, whether the said tax payer be a resident or a non-resident of Louisiana and irrespective of here domiciled locally or otherwise".

The contention which emerges from the quotation is not only novel, but startling. It advances a taxing

theory that any state might declare property to have "a taxable situs in this state", regardless of whether as a matter of fact it does have a taxing situs. It is contended that there might be substituted for the constitutional fact of situs, the fiction generated by legislative enactment. It must be apparent that if the State of Louisiana passed a statute which by fiat made watercraft taxable in the State of Louisiana regardless of situs, that the statute would be wholly unconstitutional. If that be the ultimate contention, then, no serious or substantial Federal question is presented, because this Court has, on numerous occasions, under the guidance of long recognized taxing principles, held that in order for a state to tax property, such property must be, as a matter of fact, incorporated within the mass of property in the state so as to have a taxing situs. The principles are fixed, but the facts are flexible, and the decision in each case depends upon the conclusions from the immediate facts. The decision in this case turned not on the invalidity of the statute, but on the facts and its inapplicability to the facts.

Counsel, in their brief, say that the Circuit Court of Appeals was without right "to first find that the barges and towboats have a taxing situs in Louisiana".

It is urged that Louisiana by its statute has not made it a condition for the imposition of the tax that the court should first find that the property has a taxing situs in Louisiana. Inherent in the statement is the contention that a court of law is without right to first ascertain whether property taxed is subject to the taxing sovereignty of a state. Cognate to the contention is the argument that the Circuit Court of Appeals should have blindly ap-

plied the statute to any property coming within the State of Louisiana, regardless of the time spent in Louisiana by such watercraft. Extruding from the brief of the appellants is that the United States Circuit Court of Appeals should have ascertained if any of the watercraft of the appellees had come into Louisiana, and if it had come even for a day, the tax should be assessed against such watercraft on the basis of mileage within the state and the mileage without the state, and the facts and principles of taxing jurisprudence should be discarded and there should be a blind adherence to the statutes of Louisiana, regardless of the fact that such statutes were not born of the sovereignty of the State, but were produced in defiance of the Constitution.

There is the implication in the brief of the appellants that the State of Louisiana has the power to fix the taxing situs of property. The import of the contention is that the power to declare the situs of property for taxing purposes is absolute. The suggestion of the contention is that the facts of situs are immaterial, but the power of declaration by the State of Louisiana is supreme. The statements here made find their roots in the contention of the appellants as follows:

> "This Statute *fixes* the situs in *Louisiana* of a portion of appellees' property. To therefore hold that this property has no taxing situs in Louisiana is to deny the validity of the Statute!
>
> "It is admitted that these private barge-lines run continually and constantly throughout the year in Louisiana, and they clearly come within the provi-

sions of this Statute; to hold that Louisiana cannot collect these taxes is to decide against the validity of a State Statute. This is so apparent from the reading of the Statute, and the provisions of the Judicial Code giving this Court jurisdiction, that it should admit of no further argument".

The quotation is correct in saying that the contention of the appellants admits of no argument. The mere statement of the contention refutes the need of argument and causes the contention to fall of its own weakness. The record shows that the property taxed does not continually and constantly, throughout the year, come into Louisiana. The record, on the contrary, shows that some of the watercraft which forms the basis of the assessment came into Louisiana at irregular intervals, and remained for varying periods, while some of the other property which forms the basis of the assessment never came to Louisiana within the taxable year. The soul of the argument is that if a tow-boat or barge came into Louisiana at any time, that the Legislature had the power to declare such equipment to have a taxable situs in Louisiana, regardless of the fact that such equipment might stay but a day. To hold that such equipment is beyond the reach of the taxing power of the State of Louisiana is not to hold invalid the statute when applied to facts of taxation which the statute could validly reach. To say that the Circuit Court of Appeals went beyond the provisions of the statute, and contrary to the statute, found that the property was not subject to taxation is to argue that the property of the appellees is beyond the protection of the Constitution, because the State of Louisiana had given such property a fictive situs in Lou-

isiana. To so argue is to assert that the courts of the United States are without power to apply the constitutional protection t the property of the citizen, because the State of Louisiana declares that property having a non-taxable situs in Louisiana does have such a situs.

The statute, of course, is not necessarily invalid, because it is conceivable that it has application in a constitutional area. For example, the United States Circuit Court of Appeals found that the DeBardeleben Coal Corporation had a factual situs for taxation in New Orleans, and, consequently, applied the statute. The application of the statute in that case was the convincing evidence that the United States Circuit Court of Appeals did not hold the statute invalid or unconstitutional, because had it done so, it would have rendered a judgment in favor of the DeBardeleben Coal Corporation, instead of giving judgment against it for the taxes collected on the property having a situs in Louisiana. It is, therefore, urged that the State of Louisiana is without power to give a taxing situs to property when the facts, tested by the law of taxation, show its situs to be elsewhere than in Louisiana. It is submitted that the United States Circuit Court of Appeals did not decide against the validity of the statute, but, on the contrary, applied it in what it conceived to be a proper case for its application. It is submitted that if the contention of the appellants is that the State of Louisiana has the right to tax property which comes into the State for a single day, merely by the declaration of situs, that no substantial Federal question is presented based upon such a contention. The law as pronounced by this court is that there must be an actual situs for purposes of taxation, and

that the fiction of situs is no substitution for situs. The declaration of this principle has been so unqualified and so often reiterated that the question is neither open for discussion nor decision and, consequently, the assertion of a contrary principle, based upon fiction, presents no serious or substantial Federal question.

Respectfully submitted,

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